80-700

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

ELIGAH R. ROWRY,

Petitioner,

v.

UNITED STATES OF AMERICA
UNITED STATES CIVIL SERVICE COMMISSION,
GEORGINA SHELDON, LUDWIG J. ANDOLSEK,
JOHN F. OLDFIELD and
THOMAS J. MANGAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States in proceedings to remove a government employee eligible for preference under 5 U.S.C. § 2108 is barred by the Due Process Clause of the Fifth Amendment from considering signed inculpatory statements which were obtained by agents of the Japanese government in an incommunicado interrogation, where counsel was denied, and the Status of Forces Agreement treaty between the United States and Japan requires both the right against self incrimination and the immediate right to counsel on detention or arrest of that employee? [The full text of 5 U.S.C. § 2108 (1977); 5 U.S.C. §§ 702, 704, 706 (1977); Status of Forces Agreement Between the United States and Japan, Art. XVII, par. 9, 11 U.S.T. 1652, 1666 and Agreed Minutes Art. XVII re par. 9, 11 U.S.T. 1753, 1754 (1960); U.S. Constitution Amendment V as provided in Appendix "A."]

2. Whether the United States in a proceeding to remove a preference eligible employee is barred by the Due Process Clause of the Fifth Amendment from considering inculpatory statements obtained under circumstances which the U.S. Supreme Court has held to be inherently coercive and which cast great doubt in a reasonable mind on the voluntariness and veracity of those statements?

3. Whether the Fifth Amendment Due Process Clause and the Sixth Amendment Right to Counsel bar the use by the United States of inculpatory statements in a proceeding to remove a preference eligible employee when those statements were obtained by foreign agents as the result of incommunicado interrogation without requested counsel when that interrogation is carried out in a U.S. facility with the participation of agents and employees of the United States? [The full text of the U.S. Constitution Amendment VI is provided in Appendix "A."]

4. Whether under 5 U.S.C. § 7513 (1980) the United States can dismiss a preference eligible employee without showing some rational basis for concluding that the dismissal will promote the efficiency of the service? Section 7513 of 5 U.S.C. (1980) states:

> "(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service."

[The full text of 5 U.S.C. § 7513 (1980) is set forth in Appendix "A."]

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THOMAS J. MANGAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on July 25, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been reported. The judgment which is sought to be reviewed is dated July 25, 1980 and was entered July 25, 1980.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Whether the United States in proceedings to remove a government employee eligible for preference under 5 U.S.C. § 2108 is barred by the Due Process Clause of the Fifth Amendment from considering signed inculpatory statements which were obtained by agents of the Japanese government in an incommunicado interrogation, where counsel was denied, and the Status of Forces Agreement treaty between the United States and Japan requires both the right against self incrimination and the immediate right to counsel on detention or arrest of that employee? [The full text of 5 U.S.C. § 2108 (1977); 5 U.S.C. §§ 702, 704, 706 (1977); Status of Forces Agreement Between the United States and Japan, Art. XVII, par. 9, 11 U.S.T. 1652, 1666 and Agreed Minutes Art. XVII re par. 9, 11 U.S.T. 1753, 1754 (1960); U.S. Constitution Amendment V as provided in Appendix "A."]

2. Whether the United States in a proceeding to remove a preference eligible employee is barred by the Due Process Clause of the Fifth Amendment from considering inculpatory statements obtained under cir-

cumstances which the U.S. Supreme Court has held to be inherently coercive and which cast great doubt in a reasonable mind on the voluntariness and veracity of those statements?

3. Whether the Fifth Amendment Due Process Clause and the Sixth Amendment Right to Counsel bar the use by the United States of inculpatory statements in a proceeding to remove a preference eligible employee when those statements were obtained by foreign agents as the result of incommunicado interrogation without requested counsel when that interrogation is carried out in a U.S. facility with the participation of agents and employees of the United States? [The full text of the U.S. Constitution Amendment VI is provided in Appendix "A."]

4. Whether under 5 U.S.C. § 7513 (1980) the United States can dismiss a preference eligible employee without showing some rational basis for concluding that the dismissal will promote the efficiency of the service? Section 7513 of 5 U.S.C. (1980) states:

> "(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service."

[The full text of 5 U.S.C. § 7513 (1980) is set forth in Appendix "A."]

STATEMENT OF THE CASE

A. Nature of the Case.

This action was brought in the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1331(a), for judicial review under 5 U.S.C. § 701-706, of the conduct and resolution of proceedings of the United States Civil Service Commission in the

removal from employment of petitioner, Eligah R. Rowry. Mr. Rowry seeks to set aside his termination and to be reinstated in his position in the employment of the United States. He further seeks termination of any disciplinary proceedings arising from the incident upon which the Civil Service Commission based his dismissal, monetary damages resulting from the dismissal, costs of his suit, and any other appropriate relief.

B. Course of Proceedings and Disposition by the District Court.

Mr. Rowry was terminated from his employment by the United States Air Force as a GS-7 Guidance Counselor in a manner set forth below in the Statement of Facts. This action was filed on February 11, 1977. Respondents, the United States of America, *et al.* filed a motion for summary judgment. Mr. Rowry's attorney at trial attempted to file a cross motion for summary judgment and opposition to the United States' motion on November 29, 1977, but those papers were refused for filing by the Clerk of the District Court. These points were addressed in oral argument.

Mr. Rowry argued that the decision of the Civil Service Commission should be set aside because the admission of certain statements violated his right to counsel and to due process of law. He argued that without this evidence and its fruits an insufficient case was presented against him, and that even if he had committed the offense which "culpably involved" him with Japanese law enforcement authorities, there was no adequate showing that his removal would promote the efficiency of the service.

The District Court granted summary judgment to the United States. The District Court held that Mr. Rowry had no right to counsel at the interrogation because the U.S. Air Force did not participate in it, that a confession

obtained by Japanese officials was admissible against Mr. Rowry in the United States even though he was refused in his demands for counsel, that the Civil Service Commission did not violate his due process rights. It held that Mr. Rowry, even though a preference eligible employee, could be dismissed without a specific showing as to how dismissal promotes the efficiency of the service as required by statute. 5 U.S.C. § 7513 (1980). The District Court did not address itself to the Treaty or to the reliability of Mr. Rowry's statement in the circumstances of his interrogation.

The United States Court of Appeals for the Ninth Circuit received briefs on the matter from both Mr. Rowry and Respondents. After oral argument that Court issued an order stating only that,

> "The District Court correctly determined that the Civil Service Commission's decision to discharge Eligah R. Rowry was neither arbitrary nor capricious nor an abuse of discretion."
>
> USCA, Ninth Circuit
> Order of July 25, 1980
> In Case No. 78-3023

No opinion has yet been published in this matter by the Court of Appeals. A copy of the Order of the Court of Appeals is attached as Appendix "B".

FACTS

Mr. Eligah R. Rowry is a former employee of the United States Air Force. He served as an Air Force employee in Japan for 22 years from 1953 until his involuntary separation in 1975. His removal is the basis of this action.

In November, 1974 Mr. Rowry was employed as a GS-7 guidance counselor at Yokota A.F.B., Japan. During the afternoon of November 11, 1974, Mr. Rowry was approached as he left the Officer's Club by Raymond F. Connolly, a special agent with the Air Force Office of Special Investigations. Agent Connolly advised Mr. Rowry that he was under investigation and would be interrogated by Japanese officials. He advised Mr. Rowry of his constitutional rights under the Fifth and Sixth Amendments to the United States Constitution.

Upon being so advised, Mr. Rowry promptly demanded representation by a lawyer before interrogation. Agent Connolly advised Mr. Rowry that he could contact a lawyer later at the Staff Judge Advocate Office at Yokota Air Force Base.

Agent Connolly searched Mr. Rowry's office and automobile in Mr. Rowry's presence. During the search, Agent Connolly again advised Mr. Rowry of his constitutional rights. Connolly further stated to Mr. Rowry that the investigation did not involve Americans one way or the other, that it was between the Japanese authorities and him. Connolly's search disclosed approximately 10 cartons of cigarettes in the trunk of Mr. Rowry's car; nothing else of relevance was found in either the office or the car.

Agent Connolly then took Mr. Rowry to his office on Yokota Air Force Base. He explained to Mr. Rowry that agents from the Japanese Tobacco Monopoly Corporation were going to interrogate him concerning allegations that Mr. Rowry had violated the Japanese Monopoly Act. Agent Connolly agreed to a request by Japanese officials to use the U.S. Air Force OSI offices for the interrogation.

OSI Form 31, the card from which Mr. Rowry was advised of his rights, clearly stated that the person under investigation had a right to have an attorney present prior

to any questioning. Mr. Rowry requested the presence of a lawyer at least three times before the interrogation. On each of these three occasions, Mr. Rowry was told that he could consult an attorney in the future, but that for the present he was going to be interrogated by the Japanese agents. Agent Connolly deliberately absented himself from the ensuing interrogation for the admitted purpose of avoiding the necessity of providing Mr. Rowry with an attorney. Agent Connolly's rationale was that the investigation was a Japanese matter, and Mr. Rowry was not entitled to an attorney under Japanese law or U.S. law as long as Connolly was not present during the interrogation.

Mr. Rowry was taken to the OSI Interrogation Room and left alone with three Japanese men to whom he was not introduced and who were subsequently identified as two agents of the Japan Tobacco Monopoly and an interpreter employed by the U.S. Air Force. The interpreter was not present for all of the interrogation. The interrogation consisted of two separate interviews, one of approximately four hours and a second of approximately one hour. The interpreter was absent from the first interrogation session for two periods of between five and ten minutes, during which time he had no knowledge of what occurred in the interrogation room. The interpreter's absence was at the request of the interrogators.

The Japanese agents prepared an interrogation statement in a question-answer format which purported to be a summary of the responses given by Mr. Rowry. Mr. Rowry signed the statement although it did not correctly reflect some of his answers. Mr. Rowry signed this statement because he was threatened by the primary interrogator with statements to the effect that the Japanese agents would see to it that his life would be totally disrupted and that the Japanese would jail Mr. Rowry for a substantial period of time without notice or communica-

tion to Mr. Rowry's family. The interpreter was not present during these threats. The threats and the circumstances of being interrogated alone in a foreign country and without advice of counsel or knowledge of his rights under local law put Mr. Rowry in such a state of fear that he saw no alternative but to sign the proffered statement. This fear was his only motivation for signing.

The Japan Monopoly Corporation had the statement of a Japanese national which was the product of an interrogation conducted in the same manner as that of Mr. Rowry. That statement admitted dealing in blackmarket cigarettes to avoid the Japan Tobacco Monopoly, and stated that the cigarettes sold were purchased from petitioner. The Japanese government made findings of fact based only on these two statements and levied a fine on Mr. Rowry without a hearing of any nature whatever. The results were forwarded to Mr. Rowry's employer, the United States Air Force.

On the basis of Japanese findings, a Notice of Proposed Removal was issued. Mr. Rowry opposed his dismissal and submitted various documents in support of his opposition. One of these documents was a statement signed by the above mentioned Japanese national retracting the statement that had been made to the Japanese agents and completely exculpating Mr. Rowry. In the Notice of Final Decision by the Air Force dated 17 January 1975 this offer of retraction was given no credibility on the basis that the statement was deemed irrelevant under Japanese law. Mr. Rowry appealed this decision and a hearing was held by the Civil Service Commission. A transcript of this hearing is Part II of the Administrative Record.

The evidence introduced against Mr. Rowry at the Civil Service Commission hearing consisted of the two state-

ments, including that signed by Mr. Rowry, a translation of the Japanese Tobacco Monopoly laws, several letters signed by Mr. Rowry after the Notice of Proposed Removal, testimony by Mr. Matsuda (the interpreter) and testimony by Agent Connolly. Of all of this evidence, only the testimony of Agent Connolly regarding finding 10 cartons of cigarettes in Mr. Rowry's car and the Japanese National's statement to the Tobacco Monopoly Agents, were not directly related to, or the product of, the interrogation of Mr. Rowry without counsel by the Japanese Tobacco Monopoly Agents.

After the hearing, the United States Civil Service Commission rendered a final decision sustaining the dismissal of Mr. Rowry. Mr. Rowry brought this action as soon as he had sufficient funds.

REASONS FOR ALLOWING THE WRIT

As a preference eligible employee under 5 U.S.C. §§ 2108, 7511, with over 22 years of service, Mr. Rowry was entitled to certain procedural rights under U.S. statutes and regulations. The United States as his employer was free to discharge him for cause as long as the statutory and regulatory requirements were satisfied and the United States afforded him due process of law in the observance of those requirements. Mr. Rowry was not in fact afforded due process of law for several reasons.

First, the Status of Forces Agreement between the United States and Japan, 11 U.S.T. 1652, hereinafter called the Japan SOFA, requires that a member of the U.S. civilian component have the right to counsel and protection from testifying against himself. The treaty specifically states that the right to counsel is immediate on arrest or detention. The SOFA is the supreme law of the United States under Article VI, Section 2 of the United

States Constitution, and the supreme law of Japan under Chapter X, Article 98, paragraph 2 of the Constitution of Japan. [Appendix "C."] When Mr. Rowry's demands for counsel were denied and the interrogation carried out by agents of Japan, the treaty was violated. This act was therefore illegal under the laws of both the United States and Japan.Use of this illegally extracted confession by the United States is fundamentally unfair and violative of due process. The Government's insistence that "arrest or detention" must be defined by Japanese law is erroneous because the language of the Japan SOFA was drafted by the United States and follows that of the N.A.T.O. Status of Forces Agreement. 4 U.S.T. 1792 (1953).

Second, the circumstances of Mr. Rowry's interrogation at the hands of the Japan Tobacco Monopoly were such as would cast great doubt in the minds of a reasonable person on the voluntariness and veracity of the statement which he signed. These circumstances were both of the type considered inherently coercive by the U.S. Supreme Court and of the type which cast doubt on the subjective response of the person making the statement, such as lack of experience with the procedures, language problems, and other indicia of his ability to withstand individual pressure. Use by the United States of statements signed under these circumstances was again so unfair and unreliable as to violate due process of law. *See, Ashcraft v. Tennessee,* 322 U.S. 143 (1944); *Haynes v. Washington,* 373 U.S. 503 (1963); *Brooks v. Florida,* 389 U.S. 413 (1967); *Darwin v. Connecticut,* 391 U.S. 346 (1968); *Beecher v. Alabama,* 389 U.S. 35 (1967); and *Clewis v. Texas,* 368 U.S. 707 (1967).

Mr. Rowry's due process rights as well as his right to counsel under both the Sixth Amendment and the Japan SOFA were violated by the United States by its participation in his arrest and interrogation. An agent of the U.S.

Air Force O.S.I. first arrested him and searched his office and car. The Air Force O.S.I. agent brought Mr. Rowry to the Japanese agents. He advised Mr. Rowry of his right to counsel, but then refused Mr. Rowry's request for counsel. He absented himself from the interrogation because he thought this removed Mr. Rowry's right. The interrogation was conducted in a U.S. Air Force police facility with the permission of the United States. An interpreter employed by the United States was present for most of the interrogation and later testified against Mr. Rowry at the Civil Service hearing. The involvement of the United States in the arrest and interrogation, coupled with its interest in the outcome of the removal hearing violated Mr. Rowry's right to counsel and to due process of law. The Circuits are in disagreement as to the degree to which these actions constitute U.S. Government action. *See, Brulay v. U.S.,* 383 F.2d 345 (9th Cir. 1972); *U.S. v. Chevarria,* 443 F.2d 904 (9th Cir. 1971); *Stonehill v. U.S.,* 405 F.2d 738 (9th Cir. 1968); *U.S. v. Jordan,* 23 C.M.A. 525, 50 C.M.R. 665 (1975); Kaplan, S.M., "The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries," 16 *Columbia Journal of Transnational Law*, 495 (1978).

Finally, as a preference eligible employee, Mr. Rowry by statute could only be removed for the efficiency of the service. An employing agency must demonstrate some rational basis for its conclusion that the discharge of a civil service employee will promote efficiency. *Norton v. Macy,* 417 F.2d 1161 (1969). This was not done in this case in spite of Mr. Rowry's unblemished record of over twenty-two years.

CONCLUSION

For all of the reasons set forth above it is respectfully submitted that a Writ of Certiorari should be granted.

Respectfully submitted,

KURT MELCHIOR
WILLIAM V. McTAGGART, JR.
SEVERSON, WERSON, BERKE & MELCHIOR
Counsel for Petitioner

United States District Court
Central District of California
No. CV 77-494-FW

ELIGAH R. ROWRY,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

DECISION

In this matter the United States brought on a motion for summary judgment. The matter came on for hearing with counsel for both parties present. After oral argument the Court took the matter under submission. The Court has considered the arguments, both written and oral, and the documents filed herein. The Court from the bench granted the motion. No judgment shall be entered until the Court has filed its Memorandum of Decision and signed a formal judgment.

DATED this 29 day of June, 1978.

FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE

(Original signed)

United States District Court
Central District of California

No. CV 77-494-FW

ELIGAH R. ROWRY,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

JUDGMENT

This matter came on regularly for hearing before the Honorable Francis C. Whelan, United States District Judge, presiding on the Defendant's motion for summary judgment. The Court has considered the arguments presented and the documents on file herein and has rendered its Memorandum of Decision. In accordance with that decision,

IT IS ORDERED that Defendant's motion for summary judgment be granted.

IT IS ORDERED, ADJUDGED AND DECREED that this action is dismissed with prejudice and that Defendants recover costs in the amount of $_____.

DATED this 19 day of July, 1978.

_____

FRANCIS C. WHELAN
UNITED STATES DISTRICT COURT

(Original signed)

United States Court of Appeals For the Ninth Circuit

No. 78-3023

ELIGAH R. ROWRY,

Appellant,

v.

UNITED STATES OF AMERICA, UNITED STATES CIVIL SERVICE COMMISSION, GEORGINA SHELDON, LUDWIG J. ANDOLSEK, JOHN F. OLDFIELD and THOMAS M. MANGAN,

Appellees.

ORDER

Before: MARKEY, United States Court of Customs and Patent Appeals Judge,* PREGERSON and FERGUSON, Circuit Judges.

The district court correctly determined that the Civil Service Commission's decision to discharge Eligah R. Rowry was neither arbitrary or capricious nor an abuse of discretion.

WE AFFIRM.

FILED
JUL 25 1980
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

APPENDIX A

§ 2108. Veteran; disabled veteran; preference eligible

For the purposes of this title—

(1) "veteran" means an individual who—

(A) served on active duty in the armed forces during a war, in a campaign or expedition for which a campaign badge has been authorized, or during the period beginning April 28, 1952, and ending July 1, 1955; or

(B) served on active duty as defined by section 101(21) of title 38 at any time in the armed forces for a period of more than 180 consecutive days any part of which occurred after January 31, 1955, and before the date of the enactment of the Veterans' Education and Employment Assistance Act of 1976, not including service under section 511(d) of title 10 pursuant to an enlistment in the Army National Guard or the Air National Guard or as a Reserve for Service in the Army Reserve, Naval Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve;

and who has been separated from the armed forces under honorable conditions;

(2) "disabled veteran" means an individual who has served on active duty in the armed forces, has been separated therefrom under honorable conditions, and has established the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or pension because of a public statute administered by the Veterans' Administration or a military department; and

(3) "preference eligible" means—

(A) a veteran as defined by paragraph (1)(A) of this section;

(B) a veteran as defined by paragraph (1)(B) of this section;

(C) a disabled veteran;

(D) the unmarried widow or widower of a veteran as defined by paragraph (1)(A) of this section;

(E) the wife or husband of a service-connected disabled veteran if the veteran has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia;

(F) the mother of an individual who lost his life under honorable conditions while serving in the armed forces during a period named by paragraph (1)(A) of this section, if—

(i) her husband is totally and permanently disabled;

(ii) she is widowed, divorced, or separated from the father and has not remarried; or

(iii) she has remarried but is widowed, divorced, or legally separated from her husband when preference is claimed; and

(G) the mother of a service-connected permanently and totally disabled veteran, if—

(i) her husband is totally and permanently disabled;

(ii) she is widowed, divorced, or separated from the father and has not remarried; or

(iii) she has remarried but is widowed, divorced, or legally separated from her husband when preference is claimed.

Note 169

State legislative reapportionment board was entitled to some measure of administrative or legislative discretion, and in permissible area of such discretion federal court will not substitute its judgment. *Xancey v. Faubus*, D.C. Ark. 1965, 251 F. Supp. 998, affirmed SG S.Ct. 933, 383 U.S. 271, 15 L.Ed.2d 750.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

JAPAN

Agreement Under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan [1]

Signed at Washington January 19, 1960;
Entered into force June 23, 1960.
With agreed minutes and exchange of notes.

Article XVII

. . .

9. Whenever a member of the United States armed forces, the civilian component or a dependent is prosecuted under the jurisdiction of Japan he shall be entitled:

(a) to a prompt and speedy trial;

(b) to be informed, in advance of trial, of the specific charge or charges made against him;

(c) to be confronted with the witnesses against him;

(d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of Japan;

(e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Japan;

(f) if he considers it necessary, to have the services of a competent interpreter, and

(g) to communicate with a representative of the Government of the United State and to have such a representative present at his trial.

Re paragraph 9:

1. The rights enumerated in items (a) through (e) of this paragraph are guaranteed to all persons on trial in Japanese courts by the provisions of the Japanese Constitution. In addition to these rights, a member of the United States armed forces, the civilian component or a dependent who is prosecuted under the jurisdiction of Japan shall have such other rights as are guaranteed under the laws of Japan to all persons on trial in Japanese courts. Such additional rights include the following which are guaranteed under the Japanese Constitution:

(a) He shall not be arrested or detained without being at once informed of the charge against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel;

(b) He shall enjoy the right to a public trial by an impartial tribunal;

(c) He shall not be compelled to testify against himself;

(d) He shall be permitted full opportunity to examine all witnesses;

(e) No cruel punishments shall be imposed upon him.

2. The United States authorities shall have the right upon request to have access at any time to members of the United States armed forces, the civilian component, or their dependents who are confined or detained under Japanese authority.

3. Nothing in the provisions of paragraph 9(g) concerning the presence of a representative of the United States Government at the trial of a member of the United States armed forces, the civilian component or a dependent prosecuted under the jurisdiction of Japan, shall be so construed as to prejudice the provisions of the Japanese Constitution with respect to public trials.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

Added Pub.L. 95-454, Title II, § 204(a), Oct. 13, 1978, 92 Stat. 1136.

Historical Note

Effective Date. Section effective 90 days after Oct. 13, 1978, see section 907 of Pub.L. 95-454, set out as a note under section 1101 of this title.

Legislative History. For legislative history and purpose of Pub.L. 95-454, see 1978 U.S. Code Cong. and Adm.News, p. 2723.

APPENDIX B

United States Court of Appeals For the Ninth Circuit

No. 78-3023

ELIGAH R. ROWRY,

Appellant,

v.

UNITED STATES OF AMERICA, UNITED STATES CIVIL SERVICE COMMISSION, GEORGINA SHELDON, LUDWIG J. ANDOLSEK, JOHN F. OLDFIELD and THOMAS J. MANGAN,

Appellees.

ORDER

Before: MARKEY, United States Court of Customs and Patent Appeals Judge,* PREGERSON and FERGUSON, Circuit Judges.

The district court correcty determined that the Civil Service Commission's decision to discharge Eligah R. Rowry was neither arbitrary or capricious nor an abuse of discretion.

WE AFFIRM.

FILED
JUL 25 1980
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

APPENDIX "C"

APPENDIX II

THE CONSTITUTION OF JAPAN

(English translation by the Eibun Horeisha, Tokyo)

CHAPTER X. SUPREME LAW

Article 97. The fundamental human rights guaranteed to the people by this Constitution are fruits of the age-old struggle for man to be free; they have survived the many exacting tests for durability, and are conferred upon this and future generations in trust, to be held for all time inviolate.

Article 98. This Constitution shall be the supreme law of the nation and no law, ordinance, Imperial rescript or other act of government, or part thereof, shall have legal force or validity contrary to the provisions hereof.

2. The treaties concluded by Japan, and established laws of nations, shall be faithfully observed.

Article 99. The Emperor or the Regent, as well as Ministers of State, members of the Diet, Judges, and all other public officials, have the obligation to respect and to uphold this Constitution.

Chapter XI, relating to Supplementary Provisions (Articles 100 to 103 inclusive), is omitted, since these Articles refer to entry into force, etc.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on October 22, 1980, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(*Hand delivered; forty copies*)

Clerk, United States District Court
Central District of California
United States Courthouse
312 No. Spring Street
Los Angeles, California 90012
For the Hon. Francis C. Whelan

Clerk, U. S. Court of Appeals
Ninth Judicial Circuit
Seventh & Mission Streets
San Francisco, California 94101
For the Hon. Markey, Pregerson and Ferguson

Solicitor General
Department of Justice
Washington, D.C. 20530
(*3 copies*)

Georgina Sheldon
Ludwig J. Andolsek
John F. Oldfield
Thomas J. Morgan
c/o United States Civil Service Commission
1900 East Street N.W.
Washington, D.C. 20415
(*1 copy each*)

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 22, 1980 at Santa Monica, California.

Suzanne Newman
(Original signed)

Supreme Court, U. S.
FILED
DEC 4 1980
MICHAEL RODAK, JR., CLERK

No. 80-700

In the Supreme Court of the United States

OCTOBER TERM, 1980

ELIGAH R. ROWRY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the courts below correctly concluded that petitioner's inculpatory statements, made during interrogation by Japanese officials and admitted into evidence in administrative discharge proceedings, were voluntary.

2. Whether the United States Constitution prohibits use in administrative proceedings of statements obtained, without the presence of counsel, from an employee of the United States Air Force during

interrogation by Japanese officials concerning possible violations of Japanese law.

3. Whether the Status of Forces Agreement (SOFA) between the United States and Japan requires that statements obtained from an employee of the United States Air Force at an interrogation by Japanese officials be excluded in administrative discharge proceedings because counsel was not provided at the interrogation.

4. Whether there was a rational basis for the conclusion that petitioner was discharged for such cause as would promote the efficiency of the Air Force.

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OPINIONS BELOW

The opinion of the court of appeals is unreported (Pet. App. 15). The decision (Pet. App. 13) and judgment (Pet. App. 14) of the district court are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1980. The petition for a writ of certiorari was filed on October 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

In October 1974, agents of the Japanese Tobacco Monopoly Corporation (JTMC) obtained a statement from Tatsuro Makita, a Japanese citizen, that on five different occasions he had purchased cigarettes from petitioner, a civilian employee of the United States Air Force, in violation of the Japanese Tobacco Monopoly Law (Rec. 13-15).[1] Japanese agents related this information to the Air Force Office of Special Investigations (OSI).

In November 1974, agents of the JTMC went to Yokota Air Force Base in order to interview petitioner regarding his involvement in any illegal cigarette sales. Raymond Connolly, an OSI special agent, approached petitioner, informed him of his rights under the United States Constitution, and indicated that Japanese officials wanted to interrogate him (Rec. 16).

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[1] "Rec." refers to the record in the court of appeals.

Agent Connolly then accompanied petitioner to the OSI office, where he was questioned by the Japanese officials. Agent Connolly did not attend the interview. Petitioner requested the presence of counsel at the interview but, pursuant to Japanese law, the request was denied (Rec. 17). Mitsuo Matsudo, an Air Force interpreter, attended all but 10 to 20 minutes of the interview, which lasted between five and six hours. At the conclusion of the questioning, the Japanese agents prepared two reports in English reflecting the interview and petitioner's responses. After Matsudo read the reports to petitioner in English, petitioner signed them. The reports contained a number of inculpatory statements. Based on the results of the JTMC investigation, petitioner was subjected under Japanese law to an administrative fine of $5,200 (Rec. 17).

Thereafter, the Air Force instituted proceedings to remove petitioner from its employ. On January 17, 1975, the Air Force issued a Notice of Final Decision discharging petitioner. Petitioner appealed that decision to the United States Civil Service Commission pursuant to 5 U.S.C. (1976 ed.) 7701.[2] In his letter of appeal to the Commission, dated January 31, 1975, petitioner admitted his "culpable involvement" with Japanese law enforcement authorities during his off hours (Rec. 15), pleaded for leniency, and requested punishment less severe than removal.

The Commission conducted a hearing on the discharge. Petitioner contended at the hearing that the inculpatory statements made during the JTMC inter-

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[2] In 1978, the function of reviewing adverse personnel actions of federal agencies was substantially revised and was transferred from the Civil Service Commission to the Merit System Protection Board. See 5 U.S.C. (Supp. II) 7511-7514.

rogation were involuntary and were not true. He also contended that he was denied his right to counsel at this interrogation. However, because of possible self-incrimination, petitioner refused to answer questions on cross-examination concerning the truth of the statements attributed to him by the Japanese officials (Rec. 16).

The Commission found that the evidence supported the charge that petitioner had engaged in activity violating the Japanese Tobacco Monopoly Law (Rec. 17). The Commission concluded that this conduct, which had resulted in a substantial fine under Japanese law, "was a source of great embarrassment to the Department of the Air Force and the American Government and could not be condoned" (*ibid.*). Hence, the removal action taken by the Air Force "was warranted and not unreasonable" (*ibid.*).

Petitioner then brought suit in the United States District Court for the Central District of California pursuant to 5 U.S.C. 701-706 to set aside the Commission's decision. The district court granted the government's motion for summary judgment (Pet. App. 14). The court noted that, as petitioner had conceded, Japanese law did not require the presence of an attorney during interrogation of an accused (Rec. 104), that protections under the United States Constitution did not apply to the Japanese interrogation because the Air Force did not participate sufficiently in the interrogation (*id.* at 103), and that use of the inculpatory statements resulting from the interrogation did not violate petitioner's constitutional rights (*id.* at 104, 106-107). The court also found that petitioner's discharge was not unreasonable, because it affected the "ability of a United States agency to operate effectively in a foreign

country" and also affected the goodwill of the United States in Japan (*id.* at 108). The court of appeals affirmed in an unpublished order (Pet. App. 15).

ARGUMENT

1. Petitioner asserts (Pet. 10) that his interrogation by Japanese agents was such as to call into question the voluntariness and veracity of the inculpatory statements he signed. The Civil Service Commission and the courts below properly rejected this contention.

First, in a letter to the Civil Service Commission appealing his discharge, petitioner admitted his "culpable involvement" with Japanese law enforcement authorities (Rec. 15). In addition, the interpreter, who was present for all but 20 minutes of the five or six hour interrogation, testified that the statements signed by petitioner, which had been read to petitioner in English, were consistent with the interpreter's recollection of events. Further corroboration of the accuracy of these admissions was supplied by the statement of a Japanese national, Makita, who was accused of purchasing the cigarettes from petitioner.[3]

The district court gave consideration to petitioner's claim of forced confession. Its conclusion that the statements were voluntarily made is fully supported by the record, and the court of appeals properly af-

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[3] Petitioner asserts (Pet. 8) that Makita later retracted his statement. The district court correctly concluded that the Commission had discretion to believe the original statement rather than the retraction (Rec. 7-8). The fact that Makita did not provide Japanese authorities with the retraction lends support to the credibility resolution made by the Commission and accepted by the district court.

firmed. This fact-bound question does not warrant further review.[4]

2. Petitioner contends (Pet. 10-11) that his Sixth Amendment right to counsel was violated because of what he asserts to have been participation by agents of the United States Government in his arrest and interrogation. But petitioner's statements were introduced in an administrative proceeding, not a "criminal prosecution" in which Sixth Amendment protections attach. See *United States* v. *Ward*, No. 79-394 (June 27, 1980), slip op. 5.[5] Therefore, even assuming that agents of the United States participated in petitioner's interrogation and that such participation was sufficient to invoke constitutional protections,[6] petitioner's Sixth Amendment claim is without merit.

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[4] In addition, during the Commission proceeding, when asked about the truth of the statements at the interrogation, petitioner refused to respond on the ground of self-incrimination. This Court recently recognized the propriety of drawing adverse inferences against parties in civil proceedings when they refuse to explain probative evidence offered against them. *Baxter* v. *Palmigiano*, 425 U.S. 308, 318-319 (1976).

[5] Moreover, it does not appear that criminal proceedings had been initiated against petitioner under Japanese law at the time of the interrogation. Hence, petitioner's Sixth Amendment rights did not attach, even if the Amendment were held to apply to the use in civil proceedings of a statement obtained by Japanese agents. See *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977).

[6] The involvement of United States agents in the interrogation was insufficient to make the constitutional requirement of right to counsel applicable. The initiative for the interrogation came from Japanese authorities, and petitioner was interrogated only by Japanese authorities and only con-

Petitioner also asserts that his due process rights were violated by the interrogation, but he does not identify in what manner. To the extent that he argues that use of the statements obtained in the interrogation violated his Fifth Amendment privilege against compelled self-incrimination, the answer is that the Fifth Amendment prohibits such use only in a "criminal case." *United States* v. *Ward*, *supra*, slip op. 5. Use of the statements in an administrative discharge proceeding therefore would not violate the privilege. In any event, the evidence shows that the statements were obtained voluntarily. See pages 4-5, *supra*. Moreover, given the voluntariness of the statements, it cannot be argued that use of the statements in administrative proceedings violated some more general due process right barring the use of coerced statements in such proceedings.

3. Petitioner contends (Pet. 9-10) that Japanese agents violated the Status of Forces Agreement between the United States and Japan (SOFA), June 23,

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cerning violations of Japanese law. The OSI was contacted to serve as a liaison, to meet petitioner, and to conduct a search on the Air Force Base pursuant to a Japanese search warrant. Such cooperation is consistent with, if not required by, the Status of Forces Agreement between the United States and Japan, June 23, 1960 (Art. XVII, Paragraph 10, 11 U.S.T. 1666). Agent Connolly did not participate in any way in the interrogation itself. The fact that the interview was conducted on a United States Air Force Base and a United States interpreter was present does not make the interrogation action of the United States. *United States* v. *Mundt*, 508 F.2d 904, 906-907 (10th Cir. 1974), cert. denied, 421 U.S. 949 (1975); *United States* v. *Trenary*, 473 F.2d 680 (9th Cir. 1973) (fact that United States official served as interpreter at interrogation given little weight). Nor is there any indication that discharge proceedings were contemplated at the time of the interrogation.

1960, 11 U.S.T. 1652 (1960) (Pet. App. 20-21), by not affording him counsel at the interrogation and not recognizing his privilege against self-incrimination. Article XVII, Paragraph 9(e) of SOFA (Pet. App. 20-21; 11 U.S.T. 1666) provides (emphasis added):

> Whenever a member of the United States armed forces, the civilian component or a dependent *is prosecuted* under the jurisdiction of Japan he shall be entitled:
>
> * * * * *
>
> (e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Japan.

The treaty on its face limits the specified procedural protections to persons who are being "prosecuted," and does not appear to extend such protections to persons who are merely under investigation. Likewise, the minutes accompanying Paragraph 9 of SOFA (Pet. App. 21; 11 U.S.T. 1753-1754) reveal that the rights enumerated in that paragraph are guaranteed to persons "on trial" (Pet. App. 20-21). It is clear that petitioner was not "on trial," but was only undergoing initial interrogation as a suspect.[7]

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[7] Petitioner maintains (Pet. 9) that SOFA provides that the right to counsel attaches upon arrest or detention. However, Paragraph 9 of SOFA itself provides only that when a United States employee "is prosecuted," he shall have the right to legal representation "under the conditions prevailing for the time being in Japan." The language on which petitioner relies appears in the *minutes* to Paragraph 9. The minutes provide that in addition to rights enumerated in SOFA, United States employees shall have such rights as are guaranteed under Japanese law, including the Japanese

However, even if petitioner's interrogation without counsel violated SOFA as it pertained to a possible prosecution under Japanese law, it would not follow that use of the statements in administrative discharge proceedings was improper. The Sixth Amendment right to counsel is not violated by use of uncounseled statements in proceedings that are not "criminal prosecution[s]" within the meaning of that Amendment, and there is, accordingly, no reason to believe that the parallel provision in SOFA was intended to fashion an implicit exclusionary rule in such noncriminal proceedings.

4. Petitioner argues (Pet. 11) that the Air Force has not demonstrated a rational basis for its conclusion that his discharge will promote the efficiency of the Air Force, as required under 5 U.S.C. 7513(a). This claim is insubstantial. Petitioner committed a serious violation of Japanese law. Such disregard for the laws of a foreign nation by a civilian employee of the Air Force stationed in that nation causes significant embarrassment to the Air Force and the United States and adversely affects relations between the two countries. The Air Force plainly had a rational basis for petitioner's discharge.

---

constitutional right to counsel at arrest or detention. Thus, SOFA itself does not guarantee this right. Moreover, petitioner conceded in the administrative proceedings that there is no right to counsel under Japanese law at interrogation of a suspect (Rec. 16, 104). Similarly, the privilege against compelled self-incrimination, which petitioner also asserts is protected by SOFA (Pet. 9), is among the rights listed in the *minutes* as guaranteed by the Japanese constitution; it is not listed in SOFA itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1980

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